

A M3 Technologies (Asia) Bhd & Anor v Voon Sze Lin & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22IP-41–07 OF
2021

B YUSRIN FAIDZ JC
27 JANUARY 2025

C *Civil Procedure — Anton Piller order — Search and delivery protocol — Plaintiffs sought court order to determine search and delivery protocol for accessing data extracted during execution of Anton Piller order against defendants — Whether allowing application would give plaintiffs second chance to execute Anton Piller order — Whether application ought to be allowed*

D This was the plaintiffs’ application (‘encl 44’) for the court to examine a search and delivery protocol that concerned the second to ninth defendants (‘D2’ to ‘D9’). The defendants had been involved in every aspect of the operations of the plaintiffs for an extended period of time. On 19 August 2021, the plaintiffs’
E ex parte application for an Anton Piller order (‘APO’) was allowed. During the execution of the APO, the forensic expert had copied and/or extracted and/or imaged data from the defendants’ devices which included cloud server data accessed at the office of one of the supervising solicitors. Hence, this application by the plaintiff to determine a search and delivery protocol to
F access the data extracted during the APO execution. D2 objected claiming the APO was abused because the supervising solicitors copied the entire seized items and not just the specific listed items and also complained on the integrity of the supervising solicitor who shared a vehicle with the plaintiffs’ representatives. D8 objected that encl 44 sought further directions to search for
G incriminating terms which should have been completed during the APO execution and contended that failures to properly complete tracking forms and material discrepancies in the supervising solicitors’ reports casted doubt on the veracity and authenticity of the evidence. Essentially D2 and D8 argued that encl 44 was nothing more than the plaintiffs’ disguised attempt to validate their
H abuses of the APO and shall be dismissed in limine.

Held, allowing the application:

I (1) The search protocol on the materials seized during the APO suggested by the plaintiffs would ensure that the plaintiffs’ access to the evidence copied and/or extracted and/or imaged and/or mirrored from the defendants were not prejudicial to D2 or D8. It did not exceed the APO granted earlier. D2’s allegation and complaints on the misconduct of the supervising solicitors could not form a ground to deny the plaintiffs the right that had already been conferred by the APO. It may be ethically

improper for the supervising solicitor to have been in a close proximity with the plaintiffs' representatives during the execution of the APO. But that could not solely be a ground to conclude that the integrity of the evidence collected from the execution of the APO had been compromised. The sharing of vehicle did not affect the chain of custody of the evidence as the seized materials obtained from D2 were placed in a sealed envelope in the presence of D2 and his solicitors (see paras 27–28).

- (2) The issue raised by D8 on the failure of the forensics team to complete the requisite formalities of the tracking forms which had resulted in a material break in the chain of evidence and consequently rendering such evidence totally unsafe for legal consumption, were matters to be dealt with by the court during the course of the full trial, not at this stage. Similarly, the alleged discrepancies on the reports of the supervising solicitors was an issue that should be raised at the course of the full trial and would be determined by the court at the end of the case and not at the stage of this application. D8's complain that certain applications were installed in her mobile phone after it was returned to her was a non-starter as the plaintiffs had no access at all to the listed items seized from the defendants as they are all sited with the supervising solicitors, pursuant to the terms of the APO. The IT forensic team merely extracted/copied/imaged the devices seized from D8 to an external hard disk in the complete view and presence of D8, her solicitors and the supervising solicitors and that there could be no window of opportunity for D8's mobile phone to be adulterated with certain applications as alleged. Allowing the plaintiffs' application did not tantamount to granting the plaintiffs a second bite to execute the APO. The actual intent and purpose of the current application was to establish a protocol that set out the court's instructions as to how that unboxing should be done (see paras 30–32).

[Bahasa Malaysia summary]

Ini adalah permohonan plaintif ('lampiran 44') untuk mahkamah meneliti protokol carian dan penyerahan yang melibatkan defendan kedua hingga kesembilan ('D2' hingga 'D9'). Defendan telah terlibat dalam setiap aspek operasi plaintif untuk tempoh yang panjang. Pada 19 Ogos 2021, permohonan ex parte plaintif untuk perintah Anton Piller ('APO') telah dibenarkan. Semasa pelaksanaan APO, pakar forensik telah menyalin dan/atau mengekstrak dan/atau mengimbas data dari peranti defendan yang termasuk data dari pelayan awan yang diakses di pejabat salah seorang peguam penyelia. Oleh itu, permohonan ini oleh plaintif adalah untuk menentukan protokol carian dan penyerahan bagi mengakses data yang diekstrak semasa pelaksanaan APO. D2 membantah dengan mendakwa bahawa APO telah disalahgunakan kerana peguam penyelia membuat salinan seluruh barangan yang disita dan bukan

- A hanya barangan yang tertentu disebutkan serta mengadu mengenai integriti peguam penyelia yang berkongsi kenderaan dengan wakil-wakil plaintif. D8 membantah bahawa lampiran 44 meminta arahan lanjut untuk mencari terma yang menyokong kesalahan yang sepatutnya telah dilengkapkan semasa pelaksanaan APO dan berpendapat bahawa kegagalan untuk melengkapkan borang pengesanan dengan betul dan ketidakwajaran dalam laporan peguam penyelia menimbulkan keraguan tentang kebenaran dan keaslian bahan bukti. Secara asasnya, D2 dan D8 berhujah bahawa lampiran 44 tidak lebih daripada usaha terselindung plaintif untuk mengesahkan penyalahgunaan APO mereka dan permohonan ini hendaklah ditolak di peringkat awal.

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Diputuskan, membenarkan permohonan:

- (1) Protokol carian terhadap bahan yang disita semasa APO yang dicadangkan oleh plaintif akan memastikan bahawa akses plaintif kepada bukti yang disalin dan/atau diekstrak dan/atau diimbas dan/atau dicerminkan daripada defendan tidak akan memudaratkan D2 atau D8. Ia tidak melebihi skop APO yang diberikan sebelum ini. Dakwaan dan aduan D2 mengenai salah laku peguam penyelia tidak boleh menjadi alasan untuk menafikan hak yang telah diberikan oleh APO kepada plaintif. Mungkin adalah tidak beretika bagi peguam penyelia untuk berada dalam jarak dekat dengan wakil-wakil plaintif semasa pelaksanaan APO. Tetapi itu bukan alasan untuk menyatakan integriti keterangan yang dikumpulkan semasa pelaksanaan APO telah terganggu. Perkongsian kenderaan tidak menjejaskan rantai jagaan keterangan kerana bahan yang disita daripada D2 telah diletakkan dalam sampul surat tertutup di hadapan D2 dan peguam-peguamnya (lihat perenggan 27–28).
- (2) Isu yang dibangkitkan oleh D8 mengenai kegagalan pasukan forensik melengkapkan formaliti yang diperlukan dalam borang pengesanan yang menyebabkan pelanggaran besar dalam rantai keterangan dan seterusnya menjadikan keterangan itu tidak selamat untuk kegunaan undang-undang adalah perkara yang perlu diputuskan oleh mahkamah semasa prosiding perbicaraan penuh, bukan pada peringkat ini. Begitu juga, aduan tentang ketidaksamaan dalam laporan peguam penyelia adalah isu yang harus dibangkitkan semasa prosiding penuh dan akan diputuskan oleh mahkamah pada akhir kes, bukan pada peringkat permohonan ini. Aduan D8 bahawa aplikasi tertentu dipasang dalam telefon bimbitnya selepas ia dikembalikan kepadanya adalah tidak berasas kerana plaintif tidak mempunyai akses langsung kepada item yang disita daripada defendan kerana semuanya disimpan dengan peguam penyelia, berdasarkan terma-terma APO. Pasukan forensik IT hanya mengekstrak/menyalin/mengimbas peranti yang disita dari D8 ke dalam cakera keras luaran di hadapan D8, peguamnya, dan peguam penyelia; oleh itu, tiada peluang bagi telefon bimbit D8 untuk

diubahsuai dengan aplikasi tertentu seperti didakwa. Membenarkan permohonan plaintif tidak sama dengan memberi peluang kedua kepada plaintif untuk menjalankan APO. Tujuan utama dan maksud permohonan ini adalah untuk menetapkan protokol yang menggariskan arahan mahkamah berkenaan bagaimana proses pembongkaran kotak itu harus dilakukan (lihat perenggan 30–32).]

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Cases referred to

Attorney-General v Albany Hotel Co [1896] 2 Ch 696, CA (folld)

Chappel v Davidson (1856) 8 De GM & G 1 (refd)

Cheltenham and Gloucester Building Society v Ricketts [1993] 1 WLR 1545, CA (refd)

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Eastglen International Corp v Monpare SA [1987] NLJ 56, CA (refd)

Golden Star & Ors v Ling Peek Hoe & Anor and another appeal [2024] 4 MLJ 749, FC (refd)

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Graham v Campbell (1877) 7 Ch D 490, Ch D (refd)

Jeffery Law Siew Su & Ors v Yu Gui [2017] 3 MLJ 1, FC (refd)

Novello v James (1854) 5 De GM & G 876 (refd)

Rookes v Barnard [1964] 1 All ER 367, HL (refd)

Sigma Glove Industries Sdn Bhd & Ors v Ong Chin Kok & Anor [2019] MLJU 1045, HC (refd)

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Smith v Day (1880) 13 Ch D 651, CA (refd)

Sunseekers Pte Ltd v Joshua [1990] 2 MLJ 350, HC (refd)

Ushers Brewery Ltd v PS King & Co (Finance) Ltd [1972] Ch 148, Ch D (refd)

Wakefield v Duke of Buccleugh (1865) 12 LT 628; [1865] 11 Jur NS 523 (refd)

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Wong Kok Leong (mendakwa di bawah kapasiti sebagai Ahli Jawatankuasa Persatuan Kochow Malaysia) v Foo Chu Jong (didakwa di bawah kapasiti sebagai Pengerusi Persatuan Kochow Malaysia) & Anor [2022] MLJU 1872, HC (refd)

Legislation referred to

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Rules of Court 2012 O 37 r 1

Ng Zong Hui (Kheng Hoe & Lee Yuen) for the plaintiff.

Mohd Rizal Bahari (with Amirfarid Nawawi) (Bahari & Bahari) for the second defendant.

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Yusrin Faizd JC:

INTRODUCTION

I

[1] This judgment concerns encl 377, which is the assessment of damages payable to the second defendant ('D2') pursuant to the plaintiffs' cross-undertaking as to damages. This obligation arose after the discharge of an Anton Piller order ('APO') obtained against D2. Initially granted ex parte by

- A this court to preserve evidence linked to allegations of intellectual property infringement and breach of trust, the APO was later unseated by the Court of Appeal, which decreed that the order should never have been issued against D2. Thus, the stage is now set for this court to grapple with the pivotal question: what loss has D2 suffered due to the wrongful execution of the APO, for which
- B the plaintiffs, by their cross-undertaking, are bound to answer?

BACKGROUND FACTS

- C [2] M3 Technologies (Asia) Bhd and M3 Online Sdn Bhd ('plaintiffs') developed and marketed software products over 20 years, including M3 Blast, i3TeamWorks, i3Display, and i3AppsBuilder. D2 through D8 were former or current employees of the plaintiffs in critical roles such as management, operations, and R&D. Amaz Digital Sdn Bhd ('D9') was incorporated shortly after the resignation of some defendants, with its directors and shareholders being former employees.
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- E [3] The plaintiffs allege that D9 launched products mirroring plaintiffs' software, using similar branding and client lists. It is alleged that defendants retained employment at the plaintiffs while purportedly developing competing products under D9. In substantiating their claim, the plaintiffs showed D9's use of marketing materials referencing the plaintiffs' clients and software. Email checks is argued to reveal connections between D9 and its former employees. D2, who was a former managing director of the plaintiffs, is suspected to be the person behind the scene as well as the funder of D9.
- F Therefore, based on these allegations and the available evidence, the ex parte APO was granted by my predecessor against all defendants on 19 August 2021 to prevent evidence tampering or destruction. This was subsequently confirmed through an inter parte APO on 20 January 2022.

- G [4] Affected by the APO, D2 filed an appeal to the Court of Appeal wherein his appeal was allowed with costs of RM30,000 and that the APO against D2 was set aside. The plaintiffs' application to the Federal Court seeking leave to appeal was dismissed on 13 December 2023 with costs of RM30,000. The relevant portion of the Court of Appeal's 14 July 2023 order granting right to assess damages states as follows:
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(b) Permohonan Perayu di dalam Rayuan Sivil No: W-02(IM)(IPCv)-296-02 Tahun 2022 dan W-02(IM)(IPCv)-297-02 Tahun 2022 dibenarkan setakat mana ganti rugi akan ditaksirkan oleh Mahkamah Tinggi;

- I [5] Following an assessment of damages in accordance with a notice issued under O 37 r 1 of the Rules of Court 2012 ('the Rules'), I had on 4 October 2024, granted the total sum of RM186,400 along with costs of RM20,000, in favor of D2. My decision encompasses the following:

- (a) with regards to special damages, I awarded the sum of RM36,400 to D2; A
- (b) with regards to general damages, I awarded the sum of RM100,000 to D2;
- (c) with regards to aggravated damages, I awarded the sum of RM50,000 to D2; B
- (d) D2's claim for exemplary damages is disallowed; and
- (e) interest at 5%pa on the judgment sum to be calculated from 4 October 2024 until the date of full realisation. C

[6] By a notice of appeal dated 17 October 2024, the plaintiffs have appealed against the entirety of the aforementioned decision. Meanwhile, vide a notice of appeal dated 2 November 2024, D2 is cross-appealing on the issue quantum granted for general and special damages, as well as against my decision to disallow exemplary damages. This judgment is prepared for, and equally applies to, both appeals. D

ISSUES

- [7] The application addresses the following issues: E
- (a) whether damages incurred by D2 resulted from the failed APO ('causation'); and
 - (b) how much in damages D2 is entitled to, considering the relevant factors and the impact of the failed APO ('quantum'). F

CAUSATION

Counsels' contentions on the issue of causation

[8] The learned counsel for the plaintiffs, Ng Zong Hui, argues that such element of causation is absent and therefore no damages can be claimed. The following paragraph in *Jeffery Law Siew Su & Ors v Yu Gui* [2017] 3 MLJ 1 (FC) per Jeffrey Tan FCJ is cited to support the plaintiffs' contention: H

[8] *The fact that an inquiry/assessment of damages has been directed ... does not raise a presumption that damage has in fact been suffered ... At the inquiry the onus is on the defendant to prove both the fact of damage and its causation ...* The defendant must show that both the type of loss and any links in the chain of causation can reasonably be regarded as having been in the contemplation of the parties when the injunction was granted ... Causation must be established not simply on a 'but for' basis; prima facie the undertaking must be shown to be the exclusive cause of the loss ... There must be a causal link between the injunction and the damage suffered by the defendant ... In the end ... the question becomes one of fact: did the making of the order cause the loss? The onus of proof must, in accordance with general principles, I

A lie on the defendant who asserts that he sustained damage by reason of the order ...

[9] The learned counsel for D2, Mohd Rizal Bahari, contends with conviction that the damages incurred by D2 have been factually and unequivocally demonstrated to be a direct consequence of the APO. These encompass both pecuniary losses and non-pecuniary hardships, including the unwarranted intrusion into D2's privacy, the distress occasioned by the invasive search of personal spaces, and the tarnishing of D2's reputation. In light of the evidence presented, D2 seeks redress in the form of special damages amounting to RM708,177, along with general, aggravated, and exemplary damages to address the full spectrum of harm suffered and to serve as a deterrent against such unwarranted actions.

Court's findings on the issue of causation

D [10] The requirement of an undertaking in damages as a condition for the grant of an interim injunction finds its roots in mid-19th Century jurisprudence, as illustrated by cases such as *Novello v James* (1854) 5 De GM & G 876, *Chappel v Davidson* (1856) 8 De GM & G 1, and *Wakefield v Duke of Buccleugh* (1865) 12 LT 628; [1865] 11 Jur NS 523. This undertaking to damages is not extended to the party against whom the interim order is obtained but to the court itself. In essence, the plaintiff undertakes to comply with any order which the court may make as to damages should it later determine that the defendant or any innocent third party has suffered harm as a result of the order, and that such harm ought to be compensated by the plaintiff.

G [11] In *Attorney-General v Albany Hotel Co* [1896] 2 Ch 696 (CA), it was held that the entitlement to damages does not arise independently of the undertaking, nor automatically upon the occurrence of a material event, but from the decision of the court. Applying this to our case, the judgment handed down by the Court of Appeal on 14 July 2023 serves as the basis for the recognition of such a right.

H [12] Regarding the exercise of its discretionary powers, reference is made to the case of *Cheltenham and Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 (CA). In that case, the English Court of Appeal, through Peter Gibson LJ at pp 1554 to 1555, articulated the following principle:

I The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way.

[13] In the same case, Neill LJ at pp 1550 to 1551 elaborated as follows:
When granting an injunction of an interlocutory nature it is the usual practice of

the court to require the plaintiff to give an undertaking as to damages. *The use of the word 'damages' is perhaps inappropriate because it might suggest that the grant of the injunction involved a breach of some legal or equitable rights of the defendant. The undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted.* (Emphasis added.)

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[14] In *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] Ch 148 (HC), it was held that if a defendant who has been restrained by an interim injunction, obtains a judgment establishing his right to do the act in question, he may obtain compensation for any injury sustained by him on the account of the restraint. In *Graham v Campbell* (1877) 7 Ch D 490, James LJ held (at p 494) as follows:

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The undertaking as to damages which ought to be given in every interlocutory injunction is one to which (*unless under special circumstances*) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, if found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so. (Emphasis added.)

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[15] In *Cheltenham and Gloucester Building Society v Ricketts*, Peter Gibson LJ observed, with clarity and precision, that the plaintiffs good faith, court's refusal to order costs against unsuccessful plaintiff, and the inequitable conduct of the defendant, could constitute special circumstances sufficient to bar the defendant from recovering damages (at p 1557):

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There are only a few reported decisions on what constitute special circumstances. In *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370, 380, Swinfen Eady LJ said that inequitable conduct by the defendant constituted special circumstances such that no inquiry as to damages was to be granted even if the claim for an injunction could not be sustained at the trial; but that was a case where he held that the plaintiffs were justified in applying for an interlocutory injunction. In *Upper Canada College v City of Toronto* (1917) 40 OLR 483, the court in refusing to order an inquiry as to damages on an undertaking given on the grant of an interlocutory injunction discharged at the trial, had regard to a number of circumstances including the *good faith of the plaintiffs* and *the fact that no costs were awarded against them when the action was dismissed*. In *Attorney-General for Ontario v Harry* (1982) 25 CPC 67 a factor taken into account by the court in refusing to enforce an undertaking as to damages, notwithstanding the discharge at the trial of the interlocutory injunction, was *the inequitable conduct of the defendants*. (Emphasis added.)

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[16] Like any failed interlocutory orders, the analysis on the issue of causation of losses suffered in a failed APO order generally focuses on whether the losses directly result from the wrongful grant or execution of the order. Based on the above authorities, courts assess causation by examining the nexus

- A between the applicant's conduct, the order's issuance, and the harm claimed by the respondent. Key principles include:
- (a) *direct causation*: The defendant must demonstrate that the losses were directly caused by the improper grant or execution of the APO, not merely incidental or speculative damages;
- B (b) *plaintiffs' fault*: Courts evaluate whether the plaintiff acted with bad faith, failed to make full and frank disclosure, or misused the order, contributing to the losses;
- C (c) *whether special circumstances exist*: Courts consider whether any exceptional or special circumstances exist that would justify limiting or denying the defendant's entitlement to such damages;
- (d) *reasonableness of losses*: The defendant must prove that the losses were reasonably foreseeable and flowed naturally from the wrongful order; and
- D (e) *remedial measures*: Courts may limit damages if the defendant failed to mitigate their losses or if the losses were exaggerated.
- E [17] Ultimately, the court aims to balance the need to protect the plaintiffs' legitimate interests while ensuring that the defendant is not unjustly burdened by improperly granted orders.
- F [18] On the issue of whether the APO was improperly granted against D2, I am of the considered view that the answer would be in the affirmative. This is so as D2 has sufficiently demonstrated that the plaintiffs do not hold any copyright in the M3 software alleged to have been infringed by the defendants. Based on the evidence, the plaintiffs sought to implicate D2 as a conspirator based solely on a WhatsApp exchange between an unidentified private investigator and the fifth defendant ('D5'). Such unsubstantiated allegations
- G fail to establish a strong *prima facie* case, particularly when none of the items seized from D2 were included in the plaintiffs' bundle of documents for trial.
- H [19] Moreover, the plaintiffs failed to disclose material facts to the court, including that the impugned software products are neither D9's primary offerings nor intended to remain in circulation, and that the second plaintiff is, in fact, a dormant entity. Looking at the evidence led during assessment, I find no special circumstances that would warrant denying D2 their rightful entitlement to seek recourse under the undertaking as to damages.
- I [20] Although there is no direct evidence to establish that the APO formed part of a malicious prosecution against D2 arising from his refusal to support the first plaintiffs' proposal at the extraordinary general meeting, as well as his motion to remove the first plaintiffs' directors in collaboration with D1 and others, I find that such circumstances may well explain the plaintiffs' motive in

fabricating evidence. This is particularly evident in their reliance on the false statutory declaration of Mohamad Anif, which was later retracted and admitted to be untrue during the committal proceedings. The introduction of such unreliable evidence raises serious questions about the plaintiffs' conduct and suggests a calculated effort to bolster their case against D2, despite the lack of a credible foundation.

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[21] From the evidence led during the assessment hearing, I am of the considered view that the series of hardships endured by D2 can be directly attributed to the failed APO. The issuance and subsequent execution of this intrusive order facilitated the unwelcome presence and entry of strangers into D2's home, including private areas such as bedrooms, resulting in significant disruption and invasion of personal space. These strangers conducted searches through D2's belongings and personal information, as well as those of his family members, exacerbating the intrusion into their privacy.

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[22] It is also observed that the APO led to the involuntary handover of D2's personal contents to an unidentified party, Messrs Himahlini & Co, without prior notice or adequate safeguards, further compounding the breach of D2's rights. This chain of events inflicted considerable fear and distress upon D2, while the invasive and unwarranted actions subjected him to embarrassment and speculation among his peers and family. Additionally, the APO precipitated further legal proceedings as D2 sought to challenge and rectify the consequences of the unjustified order, imposing an additional burden of time, expenses, and emotional strain. These events collectively underscore the causal link between the failed APO and the multifaceted harm suffered by D2.

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QUANTUM

Special damages

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Counsels' contentions on the issue of special damages

[23] D2 initially asserted special damages in the sum of RM708,177, the bulk of which pertained to legal fees expended in the defense against the APO and associated proceedings. In substantiation of this claim, D2 tendered invoices aggregating RM671,777, which encompassed legal fees, payments to forensic experts, and sundry incidental expenses. Additionally, a sum of RM36,400 was advanced by D2 in satisfaction of costs orders levied against them, which D2 now contends ought to be reimbursable upon the discharge of the APO.

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[24] The learned counsel for the plaintiffs argued that legal fees are not recoverable as damages, citing the Federal Court case of *Golden Star & Ors*

- A *v Ling Peek Hoe & Anor and another appeal* [2024] 4 MLJ 749 (FC) per Mary Lim Thiam Suan FCJ, which held that legal fees incurred in the same proceedings cannot be claimed as special damages. Learned counsel for the plaintiffs also challenged the authenticity of the invoices, noting that they were issued only in 2023, long after the work was done in 2021, and that no receipts were provided to prove payment.
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Court's findings on the issue of special damages

- C [25] During oral submission, learned counsel for D2 has conceded, based on the Federal Court's decision in *Golden Star & Ors v Ling Peek Hoe & Anor*, that D2's claim for legal fees of RM671,777 is not claimable and has agreed to withdraw this claim. Based on this, their special damages have been reduced to the sum of RM36,400.
- D [26] Upon careful consideration of the evidence adduced and a thorough examination of the relevant cost orders, I am satisfied that the sum of RM36,400, paid by D2 to the plaintiffs in compliance of five connected cost orders, is properly recoverable as special damages. These payments were directly necessitated by the now-discharged APO, and it is only just and equitable that D2 be reimbursed for this amount. Accordingly, I award the sum of RM36,400 under this head of claim.
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General damages

- F Counsels' contentions on the issue of general damages
- G [27] Based on D2's submissions, it is contended that he is entitled to general damages for the distress, embarrassment, and mental anguish occasioned by the execution of the APO. Learned counsel for D2 argued that the manner in which the APO was carried out constituted a profound intrusion into D2's privacy, causing significant emotional and psychological distress not only to him but also to his family. Furthermore, D2 asserts that the plaintiffs lacked a strong prima facie case to justify the granting of the APO, and that the order was sought and obtained on grounds that were, at best, tenuous and unsupported by credible evidence.
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- I [28] Learned counsel for the plaintiffs contended that D2 had not provided sufficient evidence to prove the distress and mental suffering claimed. They relied on the report of the supervising solicitors, which indicated that the APO was executed in a calm and orderly manner, with D2's consent and in the presence of his lawyer. Counsel for the plaintiffs also argued that the APO was discharged on procedural grounds, not due to any malicious conduct on their part.

Court's findings on the issue of general damages

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[29] Based on the facts, the first criticism concerns the way in which the APO was obtained. At the outset, it is an obvious consequence of an ex parte application that there is no adversarial argument. Based on the evidence presented, the Court of Appeal found that the basis of the plaintiffs' application was more on inference than direct evidence. There is an unequivocal duty to disclose all material facts when making such an application. Based on D2's submissions, the Court of Appeal found that my learned predecessor failed to articulate in his grounds the specific factors that led him to conclude the existence of a strong prima facie case. This lack of reasoning, it is contended, underpins the Court of Appeal's finding that the APO was unmeritorious.

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[30] While I accept that the execution of an APO can be distressing, I find that D2 has not provided sufficient evidence, such as medical reports or other corroborative evidence, to substantiate the extent of the distress claimed. Be that as it may, I am satisfied that the execution of the APO, which commenced at 10am on 23 August 2021 and extended over a period of seven hours without interruption for a lunch break, undoubtedly caused some degree of distress and inconvenience to D2 and his family. The prolonged and intrusive nature of the execution, coupled with the absence of any respite, would have undoubtedly exacerbated the emotional and psychological toll on D2 and his household.

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[31] A further element of financial burden is also considered in such award. While legal fees cannot be claimed as special damages, courts may still consider the financial burden of litigation when assessing general damages. For example, in cases involving breach of contract or tort, the court may take into account the claimant's overall financial loss, including the indirect impact of legal fees, when determining the quantum of general damages. In this case, the financial burden of defending against the APO and related proceedings has undoubtedly placed a significant strain on D2. This factor has been taken into account in assessing the quantum of general damages awarded.

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[32] In light of the circumstances, I award RM100,000 as general damages for the wrongful seizure and undue detention.

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Aggravated damages

Counsels' contentions on the issue of aggravated damages

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[33] Here, D2 sought aggravated damages, arguing that the plaintiffs had acted maliciously in obtaining the APO and that their conduct warranted an award of aggravated damages to reflect the court's disapproval of their actions. D2 highlighted that during the inter parte application, the plaintiffs

- A introduced new evidence in the form of a statutory declaration by Mohamad Anif dated 13 September 2021. In this declaration, Mohamad Anif alleged that he had met D2 on 4 or 5 April 2021, during which D2 purportedly discussed the establishment of D9 and invited Mohamad Anif to join the company.
- B [34] D2 presented un rebutted evidence that no such meeting took place on 4 or 5 April 2021. It was established that Mohamad Anif never visited D2's residence on those dates, let alone engaged in any discussions about joining D9. This was later acknowledged by Mohamad Anif himself during the committal proceedings, where he admitted that no meeting had occurred on the alleged dates and even apologised for the false claim. This revelation casts serious doubt on the credibility of the evidence relied upon by the plaintiffs to justify the APO and raises questions about the plaintiffs' conduct in obtaining the order.
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- D [35] Learned counsel for the plaintiffs argued that aggravated damages are not warranted because the APO was discharged on procedural grounds, and there was no finding of malicious or reprehensible conduct on their part. They relied on the case of *Sigma Glove Industries Sdn Bhd & Ors v Ong Chin Kok & Anor* [2019] MLJU 1045 (HC), where Lim Chong Fong J (as His Lordship
- E then was) held that aggravated damages are only awarded if the APO was discharged due to the plaintiff's unlawful or reprehensible conduct.
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- Court's findings on the issue of aggravated damages
- F [36] From the evidence led during the assessment hearing, I find that while the APO was discharged on procedural grounds, the plaintiffs' conduct in obtaining the order without a strong prima facie case and without full disclosure of material facts justifies an award of aggravated damages. The APO
- G is a draconian order, and its misuse should be discouraged.
- H [37] The introduction of the statutory declaration by Mohamad Anif, which was later proven to be false, also raises serious concerns about the plaintiffs' conduct in securing the order. The reliance on such evidence, which was demonstrably inaccurate and subsequently retracted, underscores a troubling lack of due diligence and a disregard for the truth in their pursuit of the APO.
- I [38] This is precisely why this court allows the assessment of damages to proceed without waiting for the outcome of the full trial. On one hand, it could be argued that none of the defendants are entitled to claim compensation for losses resulting from being barred from marketing their allegedly infringing products, as their right to do so has not yet been determined at trial. Nevertheless, I am of the considered view that the strength of the plaintiffs' case does not necessarily provide a definitive defense against enforcing the

undertaking as to damages. An award under the undertaking for damages could be justified solely on the grounds that the plaintiffs obtained the APO through improper means.

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[39] This scenario is contemplated in *Smith v Day* (1880) 13 Ch D 651 (CA) at p 425 where Jessel MR said:

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It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the Plaintiff to an interlocutory injunction, though not to relief at the trial, and then at the trial a perpetual injunction is granted. The Court in such a case has a discretion whether, under all the circumstances, the Defendant ought to have damages in respect of the interlocutory injunction having been improperly granted, though a perpetual injunction is granted at the trial.

C

[40] It is my considered view that the authority to mandate an inquiry into damages promptly upon the discharge of any ex parte APO, without deferring the matter to trial, inherently encompasses the potential to award damages for procedural, as opposed to substantive, infringements. This interpretation flows naturally from the breadth of discretion vested in the court to ensure justice is administered in a timely and equitable manner.

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[41] In *Eastglen International Corp v Monpare SA* [1987] NLJ 56 (CA), Sir John Donaldson MR stressed the importance of the sanctions for non-disclosure:

I stand by everything that I said in the *Bank Mellat* case about the importance of full and frank disclosure, and I would support any policy of the courts which was designed to buttress that by declining to give anybody any advantage from a failure to comply with that obligation. I would go further and say that *it is no answer that if full and frank disclosure had been made you might have arrived at the same answer and obtained the same benefit. This is the most important duty of all in the context of ex parte applications.* (Emphasis added.)

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[42] I am of the view that the plaintiff's conduct of introducing the false statutory declaration by Mohamad Anif, its failure to give full and frank disclosure, coupled with the intrusive and distressing execution of the APO, justifies an award of aggravated damages to reflect the court's disapproval of the plaintiffs' actions. The harm inflicted on D2 was intensified by the manner in which the APO was used, seemingly to teach D2 a lesson despite the lack of credible evidence to substantiate a strong prima facie case against him. In light of these circumstances, I find it appropriate to award RM50,000 as aggravated damages to acknowledge the additional distress, humiliation, and sense of injustice experienced by D2 as a result of the plaintiff's conduct.

H

I

Exemplary damages

A Counsels' contentions on the issue of exemplary damages

B [43] The learned counsel for D2 has advanced the contention that D2 is entitled to an award of exemplary damages. It is submitted, in support of this proposition, that the plaintiffs' conduct in procuring the APO was of such a flagrant and reprehensible nature as to justify the imposition of punitive damages, not only to censure such behavior but also to serve as a deterrent against analogous conduct in the future.

C [44] The learned counsel for the plaintiffs argued that exemplary damages are not recoverable in an assessment of damages following the discharge of an APO, as the source of such damages is the plaintiff's voluntary undertaking, not any wrongful act. They relied on the case of *Wong Kok Leong (mendakwa di bawah kapasiti sebagai Ahli Jawatankuasa Persatuan Kochow Malaysia) v Foo Chu Jong (didakwa di bawah kapasiti sebagai Pengerusi Persatuan Kochow Malaysia) & Anor* [2022] MLJU 1872 (HC), where Amarjeet Singh Serit Singh J held that exemplary damages do not fall within the scope of damages recoverable under an undertaking for an ex parte injunction. This is based His Lordship's reference to the decision of *Sunseekers Pte Ltd v Joshua* [1990] 2 MLJ 350 (HC) where Chan Sek Keong J held as follows:

F In both contract and tort it is enough that the breach of contract or duty is one direct cause of whatever damage a plaintiff has suffered — *McGregor on Damages*, 13th Ed (1972), pp 69, 118. The breach is a wrongful act on the defendant's part and the common law visits him with liability for the consequences to the plaintiff, subject always to rules as to remoteness. But *a plaintiff who sues for an injunction and obtains interlocutory relief, giving an undertaking to the court as the price of that relief, commits no wrongful act, no breach of contract or of duty when, at the trial, he fails to obtain any perpetual injunction*. If, as a result of the grant of interlocutory relief, the defendant has been harmed there will, however, have been injustice and, an undertaking having been given, the court will thereby have been armed with jurisdiction, otherwise lacking, to right that injustice and compensate the defendant for the harm done to him. (Emphasis added.)

H [45] I am in agreement with the submission of the learned counsel for the plaintiffs regarding the inapplicability of exemplary damages in this case. In any event, applying the principles established in *Rookes v Barnard* [1964] 1 All ER 367 (HL), this matter does not fall within the recognised categories for awarding exemplary damages. Specifically, there is no evidence of oppressive, arbitrary, or unconstitutional conduct by a government official. Nor is this a case where the plaintiffs' actions were calculated to generate a profit that would likely exceed any compensation payable to D2. In the absence of such circumstances, D2's claim for exemplary damages must be disallowed.

DECISION

[46] After considering the facts and circumstances presented, it is therefore ordered that the plaintiff shall pay D2 the total sum of RM186,400 as damages with interest at 5%pa on the judgment sum to be calculated from 4 October 2024 until full realisation; together with costs of RM20,000.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh

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